

E4HFVASS

Sentence

1           UNITED STATES DISTRICT COURT  
2           SOUTHERN DISTRICT OF NEW YORK  
3           -----x

4           UNITED STATES OF AMERICA,

5           v.

12 CR 626 (ER)

6           RASHAWN VASSELL,

7           Defendant.  
8           -----x

9           New York, N.Y.  
10          April 17, 2014  
11          4:00 p.m.

12         Before:

13           HON. EDGARDO RAMOS,

14           District Judge

15         APPEARANCES

16         PREET BHARARA  
17           United States Attorney for the  
18           Southern District of New York  
19         ANDREW BAUER  
20           Assistant United States Attorney

21         ANDREW PATEL, ESQ.  
22           Attorney for Defendant

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1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: U.S. v. Rashawn Vassell. Counsel,  
4 please state your appearances for the record.

5 MR. BAUER: Good afternoon, your Honor. Andrew Bauer  
6 for the government.

7 THE COURT: Good afternoon, Mr. Bauer.

8 MR. PATEL: Good afternoon, your Honor. Andrew Patel  
9 for defendant Rashawn Vassell. With me at counsel table is  
10 Ericka Adams, litigation specialist, who has been a spectacular  
11 asset.

12 THE COURT: Good afternoon to you both and good  
13 afternoon to Mr. Vassell. This matter is on for sentencing and  
14 in preparation for today's proceeding I have reviewed the  
15 presentence investigation report dated April 11, 2014 prepared  
16 by us probation officer Keisha Singleton which includes a  
17 recommendation. I have also reviewed the sentencing memoranda  
18 submitted by Mr. Patel dated April 10, 2014. That submission  
19 includes the report of a psychiatric evaluation conducted by  
20 Dr. Karen Rosenbaum and a report prepared by Miss Adams, a  
21 litigation specialist. It also includes a letter submitted by  
22 Mr. Vassell himself and an article authored by one of my  
23 colleagues, Judge Rakoff. I have reviewed a letter submitted  
24 by Messrs. Bauer and Nawaday on behalf of the government dated  
25 April 15, 2014 and, finally, I have reviewed the transcript of

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1 the guilty plea allocution taken before Magistrate Judge  
2 Francis on December 4, 2013.

3 Is there anything else I should have received or  
4 reviewed?

5 MR. PATEL: No, your Honor.

6 MR. BAUER: Not from the government, your Honor.

7 THE COURT: So first things first. Any objection to  
8 my accepting the recommendation of Magistrate Judge Francis  
9 that I accept Mr. Vassell's guilty plea?

10 MR. PATEL: No, your Honor.

11 MR. BAUER: No, your Honor.

12 THE COURT: In that event I have read the plea  
13 allocution and I find it meets the requirements of Federal Rule  
14 of Criminal Procedure 11 and I will accept the recommendation  
15 of Magistrate Judge Francis and find Mr. Vassell guilty of  
16 Count One of the superseding information.

17 Now let's turn to the PSR itself. Mr. Patel, have you  
18 read the presentence report and discussed it with your client?

19 MR. PATEL: I have, your Honor.

20 THE COURT: And, Mr. Vassell, have you received a copy  
21 of the presentence report and discussed it with Mr. Patel?

22 MR. BAUER: Yes.

23 THE COURT: Gentlemen, are there any objections  
24 regarding the factual accuracy of the report?

25 MR. PATEL: No, your Honor. The only objections,

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1       they're more in the nature of comments.

2           THE COURT: Okay. Did you want to raise those now?

3           MR. PATEL: Your Honor, they were included in our  
4 letter. I'm happy to go through it, but I assume your Honor  
5 has read our letter.

6           THE COURT: I have. And you will be given a full  
7 opportunity to comment including any comments on the PSR that  
8 you have. And you may remain seated, by the way, Mr. Patel.

9           MR. PATEL: Thank you.

10          THE COURT: Let's move to the guidelines calculation.  
11          Although I am not required to impose sentence within the  
12 sentencing range. I'm sorry, Mr. Bauer.

13          MR. BAUER: Sorry. Your Honor, I just had one comment  
14 on the PSR and that's the criminal history calculation.

15          THE COURT: Yes, sir.

16          MR. BAUER: Paragraph 45.

17          THE COURT: Yes.

18          MR. BAUER: It's a violation for unlawful possession  
19 of marijuana. I thought that that should count as one point  
20 rather than zero point. We didn't have that conviction in our  
21 plea agreement. I don't think that it was on his rap sheet at  
22 the time, but I do believe that that should count as one point.  
23 The probation department has excluded it under 4A1.2C,  
24 presumably because it's a violation but I think that we  
25 typically count that. It's not going to change the calculation

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1 for Mr. Vassell. He'll still remain in criminal history  
2 category III.

3 THE COURT: IV.

4 MR. BAUER: IV. Excuse me, sorry.

5 THE COURT: Mr. Patel, did you have a view?

6 MR. PATEL: Your Honor, I think that probation -- I  
7 think the view about this particular violation which under  
8 state law is not a crime has been evolving and I would submit  
9 that what Mr. Bauer said is historically accurate, that in the  
10 past there has been a great deal of debate about how marijuana  
11 violations should be considered, but I believe the probation  
12 office is absolutely correct in not counting this violation,  
13 which is not a crime, and under 4A1.2C now I think it's  
14 correctly perceived as the kind of activity that is not counted  
15 and should not be counted in the future.

16 THE COURT: Okay. Well, the parties have not brought  
17 this to my attention in the past, rather, prior to this  
18 afternoon.

19 (Pause)

20 MR. PATEL: Your Honor, if I could give one example of  
21 why I believe probation has got this right?

22 THE COURT: All right.

23 MR. PATEL: You have a situation, your Honor, where a  
24 person could have no other criminal conduct but two violations,  
25 non-criminal convictions, and then have two criminal history

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1 points and are not safety-valve eligible and I believe that  
2 this is a recognition of the way both the Commission and  
3 certainly the attitude writ large about how things are going.  
4 I don't dispute this is something of a change from the way  
5 things were historically done, but I think this is a healthy  
6 and appropriate analysis on the part of probation.

7 THE COURT: As I read 4A1.2C, in which the sentence is  
8 counted and excluded, it indicates that sentences for  
9 misdemeanors and petty offenses are counted except as follows,  
10 and there are sentences for the following prior offenses or  
11 offenses similar to them by whatever name they are known are  
12 counted only if A, the sentence was a term of probation of more  
13 than one year or term of imprisonment of at least 30 days or B,  
14 the prior offense was similar to an instant offense. And then  
15 it lists a number of offenses, including careless or reckless  
16 driving, contempt of court, disorderly conduct, driving without  
17 a license, false information to a police officer, gambling,  
18 hindering or failing to obey a police officer, insufficient  
19 funds, leaving the scene of an accident, non-support,  
20 prostitution, resisting arrest and trespassing. And then  
21 there's a list of offenses that are never counted. And,  
22 Mr. Bauer, it appears that because the sentence here was a  
23 conditional discharge that this would not appear to be a  
24 sentence that should be counted.

25 MR. BAUER: Why is that, your Honor? I think there

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1 are -- I think because it's a conditional discharge then it's  
2 then -- then if it fell into one of the categories under 4A1.2C  
3 then it would not be counted but I would suggest that unlawful  
4 possession of marijuana doesn't fit into any of these  
5 categories. I think the closest would be under 4A1.2C2 where  
6 it says local ordinance violations. I think it pretty clearly  
7 states except those violations that are also violations under  
8 state criminal law and unlawful possession of marijuana is a  
9 violation under New York State Penal Law. So I think it  
10 doesn't comport with any, to use the language of the guideline,  
11 it's not directly any of the offenses that are enumerated in  
12 the guideline nor is it similar to any of those enumerated and  
13 therefore I think it should count.

14 THE COURT: Mr. Patel?

15 MR. PATEL: Your Honor, the term "violation" has two  
16 meanings here. One is violation in the sense of behavior that  
17 is not condoned by statute, but violation is also a  
18 denomination of some form of offense, and in New York State  
19 this level of marijuana is deemed non-criminal as is disorderly  
20 conduct, whereas driving without a license is in fact, although  
21 it's excluded under the statutory list, is actually a  
22 misdemeanor and therefore is a criminal conduct. So  
23 essentially what we have here is we're carving -- I think what  
24 the government is essentially saying is, hey, this is drugs, so  
25 it should count. Those who passed this statute did everything

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1       they possibly could this side of what they've done in  
2       Washington and the State of Colorado to say this should not  
3       impact this man's future. And I think, your Honor, I would ask  
4       your Honor to honor that intent.

5           THE COURT: Well, I guess the bottom line is whatever  
6       I decide at least under the guidelines it's not going to impact  
7       this man's future. Moreover, I can assure both parties that  
8       whether I count the point or not, count it as a point or not  
9       will not affect the sentence I will impose on Mr. Vassell and  
10      because the government had not brought this to my attention  
11      previously and because I believe Mr. Patel is right that the  
12      probation department is not counting these types of offenses as  
13      criminal history points, I am going to not count it and I'm  
14      going to keep the criminal history category point total at 8.  
15      Okay?

16           Anything else, Mr. Bauer?

17           MR. BAUER: No. Thank you, your Honor.

18           THE COURT: Yes. Getting back to the presentence  
19      investigation report and the guideline calculation, although I  
20      am not required to impose a sentence within the guideline  
21      range, I am required to consider the guidelines and in order to  
22      do that I needed to determine the applicable range. As the  
23      parties have advised me that there is no objection to the  
24      guideline calculation contained in the presentence  
25      investigation report I find as follows: Mr. Vassell entered a

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plea of guilty to Count One of the superseding indictment charging him with Hobbs Act conspiracy in violation of 18, United States Code, Section 1951. The base offense level for that offense is 45 because pursuant to Section 2B3.1C1 of the guidelines that is the base offense level because a victim was killed under circumstances that would constitute first degree murder. Because Mr. Vassell has accepted responsibility, three levels are subtracted leaving a total offense level of 40.

The parties have also advised, and I find that there is no dispute, that the defendant is in criminal history category IV. Based on the parties' representations that in their view the guidelines and criminal history calculation in the PSR are accurate and my independent evaluation I accept both calculations in the presentence report, obviously subject to, except for the government's objection, to the failure to add the one point for the marijuana violation.

Accordingly, I find that the total offense level is 40, the criminal history category is IV, resulting in a guidelines range of 360 months to life. However, because the statutory maximum for 18 U.S.C. 1951 is 20 years the effective guidelines range is 240 months.

Mr. Bauer, did you wish to be heard before I impose sentence?

MR. BAUER: I do, your Honor. My points that I wish to make are largely already in my sentencing letter so I won't

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1 reiterate them, at least not too much. I guess what I want to  
2 point out and discuss a little further is Mr. Vassell's role in  
3 the robbery and the murder. As you know, your Honor, this case  
4 stems from the failed or botched robbery attempt at 54 Chambers  
5 Street in Newburgh where seven individuals including  
6 Mr. Vassell went to that house which they knew to be a drug  
7 spot where they sold marijuana and crack cocaine. Five of the  
8 seven people had guns, Mr. Vassell one of them, and they  
9 entered the premises. One of the robber's gun was taken by the  
10 victims and so that started a shootout which took obviously an  
11 explosive situation anyway and made it that much worse. When  
12 the robbers -- when the shootout started the robbers tried to  
13 leave the apartment building and that's when they encountered  
14 Jeffrey Henry holding the door shut on the other side. I know  
15 that your Honor knows all of that.

16 What the government had previously represented to both  
17 you, your Honor, and also to the defendants both in our motion  
18 practice and I think just us standing up here is that there  
19 were two shooters who were taking turns opening the door and  
20 kind of shooting around the door whenever the door was open to  
21 try to get Jeffrey Henry to let go of the door, Glen Thomas and  
22 Tyrell Whitaker. Those are the two shooters we had named and  
23 as I put in my letter that was based largely on our  
24 interpretation of an FBI 302 report that was written, based on  
25 speaking to a particular cooperator about the events of that

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1 night.

2 As we were getting ready, as we are getting ready for  
3 the trial of some of Mr. Vassell's codefendants we began to  
4 debrief that cooperator again as we got ready for a trial and  
5 again we asked him to tell us who the shooters were and what he  
6 said was different than what was in that report. What he said  
7 was that as everybody was trying to get out of the apartment  
8 building they were all lined up and it wasn't just Thomas and  
9 Whitaker but there were at least three people doing the, taking  
10 turns either opening the door or shooting around the door once  
11 the door had been opened just a little bit, and that third  
12 person was Rashawn Vassell. I addressed in my letter how this  
13 all came about, how our confusion came about.

14 I guess what I want to say here is that Mr. Vassell  
15 has benefited from that confusion and what I mean by that is I  
16 can fairly confidently say that if we knew then at the time of  
17 Mr. Vassell's guilty plea what we know now we would not have  
18 offered him a plea agreement to Count One which capped his  
19 exposure at 240 months. And that is borne out by the plea  
20 negotiations that we've had with the other two individuals,  
21 Mr. Thomas and Mr. Whitaker, who has not pled guilty because we  
22 haven't offered such a deal to them or at least we haven't done  
23 so yet. We would have looked for a plea to the murder count,  
24 to the 924(j) count. The difference there would have been, the  
25 guidelines would have been 360 to life. You, your Honor, still

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would have had discretion to sentence him below 360 and frankly below 240. But the starting point of the advisory guidelines range would have been much higher here.

So I think I felt it was important for me to tell you that, I think it's important for you to consider that not that the government likes to do your job for you at sentencing, Judge, but we gave Mr. Vassell a pretty favorable plea agreement, both in terms of how I just explained his conduct during the robbery and murder, but also generally. Mr. Patel, he earlier said that I was complimentary to him in my sentencing submission but it's deserved in that he came in and made a very strong pitch for his client to get the plea agreement that we ultimately gave him. And many of the arguments that he made to us are the arguments that he made before you in his sentencing submission.

So I would argue that our plea agreement or I would submit to your Honor that our plea agreement already has built into it a discount, so to speak, for those 3553(a) type arguments. I'm not trying to take your job away from you, your Honor, but I'm just being candid with you about how the plea negotiations worked in a case like this, and so I think that's important for you.

At the end of the day, your Honor, the facts are what they are. Whether he was the shooter or not, he still brought a gun into a robbery along with a number of other people that

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1 it was obviously a strong possibility that violence was going  
2 to ensue and that guns would be used. So, I mean, the conduct  
3 can't be any more serious. Mr. Vassell's conduct can't be any  
4 more serious and that in and of itself would warrant a  
5 guidelines sentence here of 240 months.

6 I would also underscore one of the other points I made  
7 in my letter which is that Mr. Vassell was caught with cocaine  
8 after leaving this courtroom back on September 11, 2013. I  
9 keep saying this courtroom, it's this courthouse. He came in  
10 for a conference and then as he left the courthouse and  
11 returned back to the prison they did a strip search and found  
12 cocaine. It's a small amount of cocaine, it obviously doesn't  
13 rise to the level of murder, but I think it is reflective of  
14 where Mr. Vassell is and in terms of his remorse or in terms of  
15 how he intends to spend the remaining years of his life, and I  
16 think the fact that he's caught with cocaine, smuggling it in  
17 from the courthouse back into jail is obviously a factor that  
18 your Honor should consider also and I would suggest also weighs  
19 in favor of the guidelines sentence of 240 months.

20 THE COURT: How does it happen that someone gets  
21 access to cocaine during transport between this courthouse and  
22 a prison?

23 MR. BAUER: The only person that can really answer  
24 that your Honor at this point is Mr. Vassell and I don't think  
25 he's going to. It's incredibly troubling. I've spoken to the

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1 marshals, spoke to Mr. Patel. I've spoken to my superiors  
2 about it. It's obviously troubling. I have my guesses as to  
3 what happened but it's not -- I don't know.

4 THE COURT: Okay.

5 MR. BAUER: So, your Honor, in some I think 240 months  
6 of imprisonment for an individual who was one of the shooters  
7 who killed Jeffrey Henry and has caused such a profound loss in  
8 obviously one family's life and in a community 240 months is a  
9 reasonable and still very significant sentence for Mr. Vassell.

10 THE COURT: Thank you, Mr. Bauer. Mr. Patel?

11 MR. PATEL: Thank you, your Honor.

12 Your Honor, the government has just asked you to  
13 impose a sentence of 20 years based on, to paraphrase  
14 Mr. Bauer, where Mr. Vassell is in his life. Where he is in  
15 his life is he's now, three years after this incident, 21 years  
16 old. So he is just old enough now to vote, to drink, to be an  
17 adult in many jurisdictions. He is an extraordinarily young  
18 man, a young man who grew up in Newburgh. I don't know how  
19 familiar your Honor is with the City of Newburgh but based on  
20 the fact that this case is going to go to trial, you're going  
21 to learn a lot more than you know now. So if the Court will  
22 indulge me.

23 I learned a great deal about Newburgh. In the 1880's  
24 it was a thriving river trade. The Erie Canal closed in 1894,  
25 it was a disaster. I believe approximately 80 percent of the

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1 houses were built before 1970 which means that lead paint was  
2 banned in 1978 so that one of the greatest single problems that  
3 Mr. Vassell, where he is in his life, is struggling with an  
4 infant blood level that was twice the amount that is known to  
5 cause permanent damage. That's where he is in his life.  
6 That's a struggle he's going to have forever. Just so your  
7 Honor should know, he's not alone. Approximately 40 percent of  
8 the children in the Newburgh schools have that problem and  
9 according to one report 100 percent of the kids in the special  
10 education program have blood lead exposure.

11 Your Honor has Dr. Rosenbaum's report and you're aware  
12 of the issues, the psychiatric issues that that has caused.  
13 This has actually affected the composition of his thinking.

14 There is no dispute really, your Honor, that Newburgh  
15 is as far from an ideal place to raise a child as is humanly  
16 possible and the support for an infant and young child was de  
17 minimis, and I'm being generous there.

18 So that's where he is in his life, your Honor. He is  
19 still a very young man who is struggling with a permanent  
20 injury and how he's going to be for the rest of his life I  
21 think is not something that can or respectfully should be  
22 judged based on what happened on a single night when he was 18.

23 I understand Mr. Bauer's suggestion that Mr. Vassell  
24 has benefited, to use his word, from the, shall we say the  
25 change of factual circumstances, and I notice in his letter, to

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1 use a colloquial expression, the government was rather quick to  
2 throw an FBI agent under the bus, but I'm not exactly sure and  
3 I'm sure it will be the subject of great examination exactly  
4 how this change came to be. And as I made, went to great  
5 lengths in my letter to point out I do not for a nanosecond  
6 think that there's been any misconduct here, but I do think  
7 that the nature of the way the human memory works, people  
8 perceive events, they honestly perceive events differently  
9 after they've gone through a number of post event experiences.  
10 I think the social science on that is really without question.  
11 So as I said, I don't doubt that the government's cooperator  
12 believes what he now reports but I also believe that any FBI  
13 agent that ever went through FBI training and made it out and  
14 became a Special Agent is going to accurately record who the  
15 shooters were in a homicide.

16 As to the offense, this is part of my problem with the  
17 2B1.1C issue in the guidelines where, murder is one of the  
18 oldest crimes in the human experience and we have gradients of  
19 homicide; first degree, second degree, manslaughter, criminally  
20 negligent homicide. None of those exist in the guidelines,  
21 just go straight to the top. Mr. Bauer suggested that this was  
22 the most serious conduct possible. I can assure your Honor  
23 that the result to Mr. Henry would confirm what Mr. Bauer said.  
24 But in terms of Mr. Vassell's conduct, which if everything the  
25 government said is correct, we have a reckless homicide here,

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1 not an intentional homicide.

2 THE COURT: Why not?

3 MR. PATEL: Because this is someone shooting blindly  
4 around the door. This is not someone picking up a gun,  
5 pointing it at someone's head and blowing their brains out.  
6 The effect might be the same but the intent is different. You  
7 know, the intent here was to escape, not to kill.

8 THE COURT: But they weren't shooting blindly around  
9 the door. They were shooting at the person on the other side  
10 of the door.

11 MR. PATEL: They were shooting, they were trying to  
12 get out. They couldn't see. They couldn't see. They're  
13 reaching through a crack in the door while they're struggling  
14 to get out. This was, I mean, they could have just as easily  
15 have wounded him and accomplished their goal if he fell down.  
16 This is not an intentional killing. This is your classic  
17 felony murder where someone died during an incident, but this  
18 is not a case where someone intentionally took the life of  
19 another human being. And outside the area of the guidelines,  
20 certainly in state criminal proceedings there is a difference  
21 between an intentional murder and a reckless murder and I think  
22 that's a fact that your Honor should consider. The guidelines  
23 prevent that, which is why I urge your Honor to adopt the  
24 guideline calculation without the 2B3.1 erasure of the, at  
25 least the communal understanding of broad criminal conduct or

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1 at least as the Commission has felt.

2 THE COURT: Mr. Patel, even if I were to accept your  
3 view of the differences between types of murders and how they  
4 should be considered here, doesn't the government's plea offer  
5 or doesn't your agreement with the government sort of take that  
6 into account by capping your exposure at 20 years? We're  
7 talking first degree murder generally speaking. We're talking  
8 either about a death penalty or life imprisonment. Under the  
9 worst of circumstances Mr. Vassell is only looking at 20 years'  
10 imprisonment, which again I'm not an expert on state law  
11 sentencing, but that would appear to me be in keeping with a  
12 reckless murder conviction.

13 MR. PATEL: Actually, your Honor, the state penalty  
14 for intentional murder would be 25 to life and I don't -- I'm  
15 somewhat pleased to be able to say this -- it's been a long  
16 time since I've been over at 100 Centre Street so I can't tell  
17 you what the current state of affairs is there, even a plea to  
18 an A1 felony which this kind of murder is would only be 15 to  
19 life. So this is even above what a plea offer would be on even  
20 an intentional homicide. But state court aside, to answer your  
21 Honor's question, I think not. Because remember, your Honor,  
22 when the government made this offer they were essentially  
23 punishing for someone who had -- they were having someone  
24 accept responsibility for his participation in a robbery in  
25 which someone did die. And that's very different from someone

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1 who perhaps negligently, recklessly, but certainly not  
2 intentionally caused the death of another individual.

3 THE COURT: Why should I treat -- assuming that  
4 Mr. Vassell didn't shoot at Mr. Henry, why should I treat him  
5 so differently? I mean, the situation that Mr. Vassell  
6 associated himself with, voluntarily committed himself to was  
7 so inherently dangerous that we're lucky that only one person  
8 died as a result of this incident.

9 MR. PATEL: Then your Honor, to answer the question  
10 that your Honor just asked, which I think is the keyword, is  
11 because then you have to look at who he is and his ability to  
12 really understand and process and understand not the criminal  
13 culpability. He understands that robbery is wrong, I'm not  
14 suggesting that he's incompetent, but if you read  
15 Dr. Rosenbaum's report, read Mr. Edwards' report and what is  
16 really clear here we're dealing with a broken young man, a  
17 really broken kid. Do we send him to prison for a generation  
18 for acts that arose -- his perception of things, his distorted  
19 perception is a function of things that were not his fault.  
20 Infants eat lead paint. It's not a volitional act, you know.  
21 Kids who eat lead paint are difficult to control and so they  
22 don't necessarily get the therapy and the medication they  
23 should. So this is not someone who just voluntarily said I'm  
24 going to be an idiot and go out and commit a robbery of some  
25 kind. We're dealing with damaged goods, and I think damaged

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1 goods get a sentence that is sufficient but not necessary for  
2 someone to by Court order get the medication to get the  
3 treatment, to get education so that when they come out they're  
4 better, they're better than when they went in. They're older,  
5 they're wiser and they can actually make going to prison to be  
6 a positive thing in their life. Mr. Vassell has already taken  
7 the first step. As damaged as he is and we know what his  
8 limitations are, that still he's been taking GED classes. He's  
9 been trying. I think we want to encourage that. Because  
10 here's the thing, Judge. He's a very young man now. He's  
11 going to be a young man when he gets out and I like him to  
12 think that it wasn't just thrown away, that there was a measure  
13 taken of him. He is what he is. He's broken, let's try to fix  
14 him. We have that opportunity.

15 THE COURT: Let me ask you, Mr. Patel, is he serving  
16 one or two state sentences?

17 MR. PATEL: He is serving, the answer to your Honor's  
18 question, he's serving two concurrent state sentences. One of  
19 them is actually a juvenile conviction and the records are  
20 sealed. I actually spoke to his, the person who represented  
21 him and I think that's about as generous a description as I can  
22 come up with, and their records indicated that the sentences on  
23 the two violations of probation were imposed concurrently with  
24 each other. But the answer is it is two sentences imposed  
25 concurrently on the same day.

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1                   THE COURT: Okay.

2                   MR. PATEL: Which brings me to one other point. I  
3 would ask your Honor to impose this sentence concurrent with  
4 those sentences. The effect of those sentences, as I mentioned  
5 in my letter, is that whatever good time Mr. Vassell says under  
6 Bureau of Prisons determination and they are the persons that  
7 initially make that determination is all counted towards his  
8 state sentence. So he's actually completed the minimum of one  
9 of his state court sentences and there is a detainer so he's  
10 going to have to go back through the state system when he gets  
11 out of federal custody unless New York changes their mind but  
12 right now there hasn't been a change of mind. I consulted with  
13 Adam Johnson, lead counsel at the MCC who I'm sure your Honor  
14 knows about what if anything can be done to correct and/or  
15 minimize this, and Mr. Johnson informed me that if your Honor  
16 makes the sentence concurrent that whereas under prior policy  
17 his federal sentence would not have started until the  
18 completion of his state sentence he will start getting credit  
19 for his federal sentence as of today. But the entire time he's  
20 been in jail, almost a year and a half, that's gone.

21                   THE COURT: But if I make it concurrent, even though  
22 the state, rather, the federal sentence begins today, he'll get  
23 credit for the time that he served in the state?

24                   MR. PATEL: Your Honor, that's a good question and I'm  
25 not a hundred percent sure. Let me tell you, the Bureau of

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1 Prisons will not give him credit, but I'm not at all certain  
2 whether New York State Department of Corrections will give him  
3 credit. I anticipate somewhere down the road that there will  
4 be some litigation in state court about that, although I'm sure  
5 that there are regulations and eventually someone will figure  
6 out that he did spend time in jail and I have some degree of  
7 confidence that that will get straightened out. But right now  
8 the detainer that he has, I actually have a copy of it here,  
9 says he has zero credit for time served in state court. That's  
10 a state document. So right now a year and a half appears to  
11 have vanished. I'm somewhat confident that someone down the  
12 road will see, will straighten this out.

13 THE COURT: I'm sorry, Mr. Patel, I'm trying to figure  
14 this out. Are you telling me as of right now he gets no credit  
15 for the federal sentence and no credit for the state sentence?

16 MR. PATEL: To answer your Honor's question, right now  
17 what I know is that he gets no federal credit.

18 THE COURT: Okay.

19 MR. PATEL: And what I have and I'm holding, it's a  
20 letter, this is the actual detainer from State of New York and  
21 it says, it's sort of addressed to the records department in  
22 the MCC concerning Mr. Vassell and it includes both his federal  
23 identification number and his New York State identification  
24 number an it says, and I quote, "he has received jail time  
25 credit of zero days," unquote. Whether that will -- and this

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1 letter is dated April 2, 2014.

2 THE COURT: Okay. And, Mr. Bauer, is that your  
3 understanding about his time as being calculated if you know?

4 MR. BAUER: I'm not sure that I have an understanding  
5 one way or the other. But what Mr. Patel is saying is  
6 consistent with my understanding of how it works generally.

7 THE COURT: Very well.

8 MR. BAUER: Your Honor, just on the point of  
9 concurrent versus consecutive. I hear Mr. Patel making an  
10 argument as to how it would work and why it would be good for  
11 his client. What I don't hear is any objection or reason why  
12 you should sentence him concurrently. I think's because I'm  
13 not really sure there is one except that it will be less time  
14 for him. These are completely different sentences, I'm sorry,  
15 completely different offenses and the sentence that he is  
16 serving in the state, which, by the way, as Mr. Patel said, for  
17 two sentences, there's a state interest in him serving time and  
18 being punished for that, that is separate and apart from the  
19 interests that you face here today. So the government would  
20 suggest that there is no basis except for the fact that I  
21 believe you just have the discretion to do it if you want to  
22 sentence him concurrently.

23 THE COURT: Okay.

24 MR. PATEL: Your Honor, I would respectfully and  
25 actually I mean that, because I really respect Mr. Bauer,

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1 disagree with that assessment. There is a fundamental fairness  
2 that everyone else who is represented in state court by  
3 competent counsel, which he was not, that lawyers would have  
4 brains to call me up and say, and I would have said wait until  
5 the federal sentence has been imposed because all his good time  
6 is going to go away and his criminal history is going to go up.  
7 I've had that conversation with state attorneys many times. I  
8 didn't get a phone call this time. It was just, he was just  
9 processed like baloney through a factory and it's disgraceful.  
10 And to add time to the amount of time that he spends in jail  
11 because he received such horrible legal advice, I don't think  
12 that's the right thing to do and your Honor has the ability to  
13 avoid the consequences of his getting bad legal advice.

14 THE COURT: Okay.

15 MR. PATEL: Your Honor, the only other thing that I  
16 would ask is that your Honor recommend that he be designated to  
17 a facility in the northeast. His mother, grandfather and  
18 mother of his son are here today. He has been maintaining a  
19 relationship with these folks and that's a good thing. I would  
20 also ask your Honor to recommend, because I know that's all you  
21 can do, that Mr. Vassell receive the mental health treatment  
22 and medication that he so clearly deserves and that he receives  
23 the opportunity to go to school and I'm sure there's a facility  
24 in the northeast region that has the ability to provide those  
25 services. I would ask your Honor to consider making

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1 Dr. Rosenbaum's report part of the presentence report. Which  
2 as your Honor knows the PSR is sort of the Bible in the BOP and  
3 therefore they will have this information and her  
4 recommendations and the reason for it, for those  
5 recommendations.

6 Other than that, your Honor, I think I've covered all  
7 the territory that needs to be covered.

8 THE COURT: Mr. Bauer, did you have any view on the  
9 recommendation that Dr. Rosenbaum's report be made a part of  
10 the PSR? I must say I'm not familiar with such a procedure.

11 MR. BAUER: Right. I am not either, your Honor. I  
12 was trying to think if there was any reason why not, but I  
13 think it would be more for his privacy interests than anything  
14 else, but if he's the one who is asking for it then I have no  
15 objection. I don't know how it actually happens. I think you  
16 or Mr. Patel would have to get in touch with the probation  
17 department and have it formally added like an amendment to the  
18 report.

19 MR. PATEL: Your Honor, as your Honor could see on  
20 page 11, paragraph 69, you provided a copy of Dr. Rosenbaum's  
21 report to the probation department which is summarized and  
22 referenced here so I think adding the reports so they actually  
23 potentially hopefully treat people at the BOP, they could have  
24 a head start.

25 THE COURT: And the PSR is treated as a confidential

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1 document going forward as well. So, okay.

2 MR. PATEL: Thank you, your Honor.

3 THE COURT: Mr. Vassell, you have an absolute right to  
4 tell me anything you want before I impose sentence. Is there  
5 anything that you wish to say?

6 THE DEFENDANT: Yes. I just want to apologize to the  
7 deceased's family and to my family and that's it, your Honor.  
8 That's it.

9 THE COURT: Thank you. In deciding the sentence to  
10 impose, in addition to the sentencing guidelines I have  
11 considered all of the factors set forth in Section 3553(a) of  
12 Title 18 of the United States Code, including the nature and  
13 circumstances of this offense and the history and  
14 characteristics of Mr. Vassell. I considered the need of the  
15 sentence imposed to reflect the seriousness of the offense, to  
16 promote respect for the law, to provide a just punishment for  
17 the offense, to afford adequate deterrence to criminal conduct,  
18 to protect the public from further crimes of the defendant and  
19 to provide the defendant with needed educational and vocational  
20 training, medical care and other correctional treatment in the  
21 most effective manner. I've considered the policy statements  
22 applicable under the guidelines. I have considered the need to  
23 avoid unwarranted sentence disparities among similarly situated  
24 defendants and I have not considered restitution in that it's  
25 not applicable in this case.

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Having considered these factors, it is my intention to impose a sentence of 223 months to be followed by three years of supervised release and a \$100 special assessment. That amount takes into consideration the 17 months that Mr. Vassell has been held in federal custody while not getting credit. I will not impose a fine as I find that Mr. Vassell is not able to pay a fine and there's no agreement concerning forfeiture, is that correct, Mr. Bauer?

MR. BAUER: Yes, your Honor.

THE COURT: I believe that this sentence is sufficient but not greater than necessary to comply with the purposes of sentencing set forth in Section 3553(a) for the following reasons: This is obviously a very serious offense, as serious an offense as any judge has to deal with in this courthouse. Mr. Vassell, the crime that you and your co-conspirators committed was so inherently dangerous that as I said earlier we are lucky that only one life was lost, sad though that may be to observe. Several other young men could have very easily lost their lives in those few murderous moments, including you.

I considered also that you are not a stranger to the criminal justice system. You have a formidable criminal history and have been involved in the drug trade for many years. And effectively so. And while I took very seriously the reports that were submitted on your behalf by Dr. Rosenbaum and Ms. Adams you were a functioning human being, as Mr. Patel

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1 indicated, you were not incompetent, you were a functioning  
2 adult but you functioned as a criminal and not just as a  
3 criminal but as a violent criminal.

4 I know that the Town of Newburgh is a very difficult  
5 town to live in. However, I also know that there are hundreds,  
6 if not thousands, if not tens of thousands of kids from those  
7 very neighborhoods that you grew up in that do good or at least  
8 are trying. And their efforts are being made that much harder  
9 by you, the actions you have taken. So I take this very  
10 seriously, and I think that this is a crime that deserves a  
11 substantial period of incarceration, because at the end of the  
12 day a man's life was taken and you played a significant role in  
13 that man's life being taken.

14 In sentencing you, however, I am required to look at  
15 the entire person; the good and the bad, and like I indicated,  
16 I read very carefully the reports of Dr. Rosenbaum and  
17 Ms. Adams and I greatly appreciate that you suffered under the  
18 disability of untreated mental health issues and that you had  
19 very precious few adults in your life who cared enough to take  
20 the time to insure that your needs were met. Clearly, a lot of  
21 people failed you. A lot of systems failed you. And for that  
22 obviously you deserve some measure of credit and I also take  
23 Mr. Patel's words on your behalf very seriously. I believe as  
24 he does that you are not beyond redemption and I am hopeful  
25 that because even when you serve this sentence you will still

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1 be a very young man, that you take the time during your period  
2 of incarceration to begin to make the changes that you appear  
3 to understand are necessary in order for you to be a productive  
4 member of society and a father to your son when you are  
5 released from prison. Hopefully you have turned your back on  
6 the person who even while incarcerated was somehow had  
7 sufficient resources and wherewithal to obtain cocaine at some  
8 point while being transported from this room to the place where  
9 you were incarcerated. Hopefully the person that Mr. Patel  
10 described to me just a few moments ago is no more and that you  
11 will take this time and use it wisely.

12 Does counsel know of any legal reason other than what  
13 has already been argued why the sentence should not be imposed  
14 as stated?

15 MR. BAUER: No, your Honor.

16 MR. PATEL: No, your Honor. May I inquire as to this  
17 sentence being concurrent?

18 THE COURT: This sentence is to be served concurrently  
19 with the terms of incarceration he is currently serving.

20 MR. PATEL: Thank you.

21 THE COURT: It is the judgment of this Court,  
22 Mr. Vassell, that you be committed to the custody of the Bureau  
23 of Prisons for 223 months to be served concurrently with the  
24 terms of incarceration that you are currently serving. That  
25 will be followed by three years of supervised release. The

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standard conditions of supervised release 1 through 13 shall apply. In addition, the following special and mandatory conditions will apply: The special conditions will be that the defendant will participate in a program approved by the United States probation office which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider as approved by the probation office. The defendant will be required to contribute to the cost of services rendered in an amount determined by the probation officer based on ability to pay or availability of third party payment. The defendant shall participate in a mental health program approved by the U.S. Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the cost of services rendered and not covered by third party payment, if the defendant has the ability to pay.

The Court authorizes the release of available psychiatric and psychological evaluations and reports to the health care provider. The defendant is to report to the nearest probation office within 72 hours of release from custody.

The following mandatory conditions shall apply: The

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1 defendant shall not commit another federal, state or local  
2 crime. The defendant shall not illegally possess a controlled  
3 substance. The defendant shall not possess a firearm or  
4 destructive device. Mandatory drug testing condition is  
5 suspended due to the imposition of the special condition  
6 requiring drug treatment and testing. The defendant shall  
7 cooperate in the collection of DNA as directed by the probation  
8 officer.

9 You are ordered to pay a mandatory special assessment  
10 of \$100 on the count of conviction which shall be due  
11 immediately. As I indicated previously, I will not impose a  
12 fine. I will also make the following recommendations as  
13 requested by Mr. Patel: I will recommend that you be  
14 designated to a facility in the northeast region and in  
15 addition to the drug treatment program that also that you be  
16 provided with mental health treatment and be designated to a  
17 location in the northeast region where you can be provided with  
18 educational services. I will as well attach a copy of  
19 Dr. Rosenbaum's report to the PSR.

20 Mr. Bauer, are there any open counts or open  
21 indictments?

22 MR. BAUER: Open counts and I guess the underlying  
23 indictment as well. The government would move to dismiss those  
24 charges now.

25 THE COURT: That application is granted. That

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1 constitutes the sentence of the Court. I take it that there  
2 was a waiver of appeal in the plea agreement with Mr. Vassell,  
3 Mr. Bauer?

4 MR. BAUER: That's correct, your Honor.

5 MR. PATEL: That's correct, your Honor.

6 THE COURT: And I further take it that because of the  
7 sentence that I imposed that Mr. Vassell's appellate rights are  
8 severely restricted in that event.

9 MR. PATEL: That's correct, your Honor.

10 THE COURT: Notwithstanding that, Mr. Patel, will you  
11 assure me that you will promptly and thoroughly discuss with  
12 Mr. Vassell the effect of the appeal waiver in his plea  
13 agreement?

14 MR. PATEL: I have actually already done that.

15 THE COURT: Thank you, Mr. Patel. Is there anything  
16 further?

17 MR. PATEL: Yes, your Honor. I have submitted to your  
18 Honor a CJA form to obtain the minutes of this proceeding.  
19 Normally your Honor I would ask that for designation purposes,  
20 it makes Mr. Vassell's life easier. This time your Honor I'm  
21 asking because based on experience very often my clients when  
22 they're in court all they can really hear is their own  
23 heartbeat but I think it would be good for Mr. Vassell to study  
24 what your Honor said at a quieter time.

25 THE COURT: I have that form, Mr. Patel, and I'm

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1 signing it now.

2 MR. PATEL: Thank you very much.

3 MR. BAUER: Your Honor, before we go may I just  
4 clarify the aspect of your sentence where you sentenced him to  
5 223 months to account for the 17 months that he was in federal  
6 custody and that he did not get credit for?

7 THE COURT: Yes.

8 MR. BAUER: When you sentenced him concurrently, I  
9 didn't hear Mr. Patel saying, and if I agreed before I  
10 certainly didn't mean to, that he wasn't going to get state  
11 credit for these 17 months, and I believe that he will have  
12 gotten credit under his state sentence for these past 17 months  
13 and so it's my understanding that if you were to sentence  
14 him -- let's hold off.

15 (Pause)

16 MR. BAUER: Your Honor, my concern -- I'm sorry, I  
17 will put on the record Mr. Patel showed me a letter from the  
18 state Corrections Authority that says that he hasn't gotten any  
19 credit for his state time. That makes no sense to me. I am  
20 sorry if I didn't pick up on this when he was saying it  
21 earlier, but what I was agreeing to earlier was he wouldn't be  
22 getting credit for the federal time. But I'm concerned -- I'm  
23 concerned, I think that this sentence might be a windfall of 17  
24 months for Mr. Vassell once he's corrected that he will get  
25 state time credit for those 17 months and once you issue the

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1 concurrent sentence then the BOP will then trace it back to  
2 those 17 months as well.

3 THE COURT: Well, he's going to be doing 223 months  
4 beginning now, correct?

5 MR. PATEL: Correct.

6 THE COURT: He's been in custody for 17 months,  
7 correct?

8 MR. BAUER: He's been in custody for 17 months.

9 THE COURT: So the total that he will receive on this  
10 federal sentence will be 20 years and it is my view that he  
11 need not do a day more than 20 years.

12 MR. BAUER: So that was my clarification. That the  
13 223 months starts today, you're not intending it to date back  
14 the 17 months.

15 THE COURT: Correct. Correct.

16 MR. BAUER: All right. That was a big hullabaloo  
17 just for that clarification.

18 THE COURT: Quite all right. Anything further?

19 MR. PATEL: No, your Honor.

20 THE COURT: Mr. Patel, I must put on the record that  
21 as always your submission on behalf of Mr. Vassell and your  
22 other clients has been extraordinarily helpful to your clients,  
23 I believe.

24 MR. PATEL: Thank you, your Honor.

25 (Adjourned)